Supreme Court, U.S.
FILED
02 - 10 JUL - 1 2002
OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE M. GALAZA, Warden, *Petitioner,*

v.

MICHAEL JEROME POWELL, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
PEGGY RUFFRA
Supervising Deputy Attorney General
JOHN R. VANCE, JR.
Deputy Attorney General
Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5864
Fax: (415) 703-1234
Counsel for Petitioner

1779

QUESTION PRESENTED

Whether an instruction on an element of a criminal offense found to violate *Carella v. California,* 491 U.S. 263 (1989) and *Sandstrom v. Montana*, 442 U.S. 510 (1979) is subject to harmless error analysis.

TABLE OF CONTENTS

	Page
PETITION FOR WRIT OF CERTIORARI	1
OPINION OR JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	2
RELEVANT CONSTITUTIONAL PROVISION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	12

TABLE OF AUTHORITIES

Cases	Page
Arizona v. Fulminante 499 U.S. 279 (1991)	8
Boyde v. California 494 U.S. 370 (1990)	7
Caldwell v. Bell F.3d ___, 2002 U.S. App. LEXIS 7858, 7-8 (6th Cir. April 30, 2002) (2002 WL 753804)	10
California v. Roy 519 U.S. 2 (1996)	8, 9
Carella v. California 491 U.S. 263 (1989)	i, 5, 7-9
Coleman v. Calderon 525 U.S. 141 (1998)	11
Johnson v. United States 520 U.S. 461 (1997)	8
Moore v. Ponte 186 F.3d 26 (1st Cir. 1999)	10
Neder v. United States 527 U.S. 1 (1999)	8-10
Peck v. United States 106 F.3d 450 (2n Cir. 1997)	10

TABLE OF AUTHORITIES (continued)

	Page
Powell v. Galaza 282 F.3d 1089 (9th Cir. 2002)	5, 7
Rose v. Clark 478 U.S. 570 (1986)	8
Sandstrom v. Montana 442 U.S. 510 (1979)	i, 5, 7, 9
Sullivan v. Louisiana 508 U.S. 275 (1993)	7-10
Yates v. Evatt 500 U.S. 391 (1991)	8
Constitutional Provisions	
United States Constitution	
Fourteenth Amendment	2
Sixth Amendment	2, 9
Statutes	
28 United States Code	
§ 1254(1)	2
§ 2254 (d)	5, 7
Penal Code	
§ 1320.5	3

IN THE SUPREME COURT OF THE UNITED STATES

No.

GEORGE M. GALAZA, Warden, *Petitioner,*

v.

MICHAEL JEROME POWELL, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

George M. Galaza, Warden, California State Prison at Mule Creek, [herein after the State], respectfully petitions for a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed March 4, 2002, appears at Appendix A to the petition and is reported at 282 F.3d 1089 (9th Cir. 2002). The Ninth Circuit's April 16, 2002 order denying the State's petition for rehearing and suggestion for rehearing en banc appears at Appendix B. The unreported district court opinion denying respondent Powell's petition for writ of habeas corpus appears at Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals granting habeas corpus relief was entered on March 4, 2002. It denied the State's petition for rehearing and suggestion for rehearing en banc on April 16, 2002. Jurisdiction of this Court is timely under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In November 1994, Powell pled guilty in state court to felony possession of cocaine for sale, which carried a maximum sentence of four years. He was released on bail, and sentencing was scheduled for February 23, 1995. Powell failed to appear and the court issued a bench warrant. Powell was arrested on the warrant and reappeared in court on March 23,

1996. He was charged with felony failure to appear in violation of California Penal Code § 1320.5, and burglary and robbery prior convictions were alleged as "strikes" under California's three strikes law.

At Powell's jury trial for failure to appear, he sought to present a defense of "necessity." He contended that because he had testified in December 1994 for the prosecution in a murder case involving the Black Guerilla Family (BGF) and subsequently received threats on his life, he was afraid he would be killed in prison. The trial court ruled that a necessity defense was unavailable under state law and therefore the defense was inadmissible. Powell did not challenge the propriety of that ruling in his federal habeas petition.

Despite the trial court's pretrial ruling, Powell testified before the jury that he had intended to "do the time" on the drug charge and then get on with his life, but then he got "really worried about [] the BGF member that was going to kill me when I got to San Quentin." Powell stated, "I got scared for my life."

After Powell made these statements in court, the trial court explained to the jury at some length that it had determined a necessity defense was not available in this case because such a defense required an *immediate* threat of harm and could not be invoked where the defendant had other recourse, such as telling a judge, parole officer, or prison official about the situation. The trial court also told the jury it could not be swayed by compassion or sympathy in determining whether Powell was guilty. In the course of making these comments, the trial court stated,

> The other thing about it is, it [the necessity defense] doesn't relate in the slightest to the subject of intent. In fact, if you look carefully and logically at what has been said here about why the defendant didn't come to court, it doesn't vindicate or eliminate the intention to evade the court process. In fact, it starts with an admission that he intended to evade the court process.

> So it doesn't eliminate the mental element of this offense either. What he's saying by his repeated statements against my order is that he didn't come to court because he wanted to evade the process of the court, because he knew in all reason that he was going to be sent to prison. And that's what the element or the intentional element of this offense is about: intent to evade the court process.
>
> Now, when you get to the point where he wants to say, "But there was this great reason —" okay, that's something that the Court might consider at the time of sentencing, but it has absolutely nothing to do with explaining that there was not an intentional evasion of the court's process, which was one of the elements of the offense.

At the close of testimony, the trial court instructed the jury on the requisite intent for failure to appear as follows: "In order to prove such crime, the following elements must be proved: [] With the specific intent to evade the process of the court, [defendant] [w]illfully failed to appear as required. [] The word `willfully' when applied to the intent with which an act is done or omitted means with a purpose or willingness to commit the act or to make the omission in question. The word `willfully' does not require any intent to violate the law, or to injure another, or to acquire any advantage." The trial court also instructed the jury, "I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness. If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion." "Do not conclude that because an instruction has been given that I am expressing an opinion as to the facts."

Powell was convicted of failure to appear, and the prior convictions were found true. On December 23, 1996, the

court sentenced Powell to 25 years to life, and also imposed a four-year sentence on the original drug charge.

On direct appeal, the California Court of Appeal rejected Powell's claim that the trial court's comments were prejudicial, stating, "Powell's evidence, including that which he was precluded from introducing, did not support a defense of necessity and did not negate the element of intent to evade the court process. It follows that no direct prejudice resulted from so informing the jury." The California Supreme Court denied review.

On May 18, 1999, Powell filed a petition for writ of habeas corpus in federal court.[1/] On December 13, 2001, the district court denied relief. Appendix C.

On March 4, 2002, the Ninth Circuit Court of Appeals granted the writ in a published opinion. Appendix A; *Powell v. Galaza*, 282 F.3d 1089 (9th Cir. 2002). The Ninth Circuit found that the trial court's comments instructed the jury it was required to find the intent element satisfied, thereby creating a mandatory presumption in violation of *Carella v. California*, 491 U.S. 263 (1989) and *Sandstrom v. Montana*, 442 U.S. 510 (1979). *Id.* at 1095-1096. The Ninth Circuit further found that such an erroneous instruction on an element of the offense was structural error not subject to harmless error review because "the wrong entity — the judge rather than the jury — becomes involved in rendering the verdict." *Id.* at 1096-1097.

The State petitioned for rehearing and rehearing en banc, which the Ninth Circuit denied on April 16, 2002.

---

1. Because Powell's petition was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) federal habeas corpus is restrained by the standard now forth in 28 U.S.C. § 2254 (d). That is, relief may not be granted unless the state court decision was contrary to or an unreasonable application of applicable federal law as determined by this Court.

Appendix B. On April 24, 2002, the Ninth Circuit granted the State's request to stay issuance of the mandate pending this petition for certiorari. On May 7, 2002, the district court granted Powell's request for bail.

REASONS FOR GRANTING THE WRIT

In *Powell v. Galaza*, the Ninth Circuit construed the trial court's comments as an instruction and determined that a reasonable juror "easily could have understood this as an instruction that she or he was required to find the specific intent element satisfied." *Id.* at 1096.[2/] The court found the instruction constituted error under *Carella v. California,* 491 U.S. 263, and *Sandstrom v. Montana*, 442 U.S. 510, which prohibit instructions creating mandatory presumptions. *Id.* at 1095-1096. Although both *Carella* and *Sandstrom* expressly found that such instructional error is subject to review for harmlessness, the Ninth Circuit held, "An instruction that a particular element has been satisfied cannot be reviewed for harmless error because the wrong entity — the judge rather than the jury — becomes involved in rendering the verdict." *Id.* at 1096. The court found the instruction in this case was "effectively the same as a directed verdict for the state," and therefore analogous to *Sullivan v. Louisiana*, 508 U.S. 275

---

2. The state contended in the state and federal courts that the trial court's comments did not constitute an instruction at all, but merely explained why the jury could not consider Powell's admittedly inadmissible testimony. The Ninth Circuit was the only reviewing court to construe the comments as an instruction. The circuit court, thus, avoided the limitations of § 2254 (d) by determining the state court had failed to apply applicable Supreme Court precedent. Ironically, in then determining that the instruction constituted error, the Ninth Circuit itself failed to cite the applicable test set forth in *Boyde v. California*, 494 U.S. 370, 380 (1990), whether there is a reasonable likelihood the jury applied the instruction in a way that prevented consideration of constitutionally relevant evidence.

(1993), where this Court held a defective reasonable doubt instruction constituted structural error.

The Ninth Circuit's conclusion that an erroneous instruction creating a mandatory presumption as to an element of an offense is reversible per se is in direct contravention of this Court's precedent mandating harmless error analysis for such errors. This Court has repeatedly held that the kinds of structural errors not amenable to harmless error analysis are confined to those that deprive a defendant of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence. . . and no criminal punishment may be regarded as fundamentally fair." *Arizona v. Fulminante*, 499 U.S. 279, 310-311 (1991) (citation omitted); *Johnson v. United States*, 520 U.S. 461, 468-469 (1997) ("We have found structural errors only in a very limited class of cases," i.e., those involving a total deprivation of the right to counsel, lack of an impartial trial judge, unlawful exclusion of grand jurors of defendant's race, denial of right to self- representation, denial of a public trial, and erroneous reasonable doubt instruction); *Sullivan v. Louisiana*, 508 U.S. at 282 ("it is the rare case in which a constitutional violation will not be subject to harmless-error analysis") (Rehnquist, C.J., concurring). There is a "strong presumption" against finding that a particular type of constitutional violation constitutes structural error. *Rose v. Clark*, 478 U.S. 570, 579 (1986).

This Court has repeatedly found that instructional error concerning an element of a criminal offense is subject to harmless error review. *Neder v. United States*, 527 U.S. 1 (1999) (omission of element of materiality for fraud); *Johnson v. United States*, 520 U.S. 461 (1997) (omission of element of materiality for perjury); *California v. Roy*, 519 U.S. 2 (1996) (per curiam) (omission of element of intent for aiding and abetting); *Yates v. Evatt*, 500 U.S. 391, 402-404 (1991) (mandatory rebuttable presumption on element of malice); *Carella v. California*, 491 U.S. 263 (1989) (per curiam) (mandatory conclusive presumption on element of intent); *Rose*

v. Clark, 478 U.S. 570 (mandatory rebuttable presumption on element of malice); *Sandstrom v. Montana,* 442 U.S. 510 (mandatory presumption on element of intent). The Court has specifically held, "'constitutional error' of the sort at issue in *Carella* is a 'trial error,' not a 'structural error,' and [] is subject to 'harmless error' analysis." *California v. Roy,* 519 U.S. at 5.

While the Ninth Circuit repeatedly stated that *Carella* and *Sandstrom* "provide the controlling authority here," 282 F.2d at 1095, 1096, 1097, 1099, it then concluded that *Sullivan v. Louisiana* governed the question whether the error was subject to harmless error review. The Ninth Circuit found that the trial court's "directed verdict" on the element of intent allowed the judge, instead of the jury, to render the verdict, resulting in structural error under the Sixth Amendment. 282 F.3d at 1096-1097. However, this Court rejected an identical argument in *Neder*. There, the trial court believed that the element of materiality for fraud was not a question for the jury, determined as a matter of law that the evidence established materiality, and instructed the jury that it "need not consider" that element. This Court noted that while it would not be "illogical" to extend the reasoning of *Sullivan* from a defective reasonable doubt instruction to a failure to instruct on an element of the crime, that approach "cannot be squared with our harmless-error cases." *Neder*, 527 U.S. at 11-12.

This Court has consistently required instructional error involving an element of an offense to be assessed for harmlessness, regardless whether the error is characterized as an "omission," "misdescription," or failure to obtain a "complete verdict" because the jury did not render a finding on the actual element. *Id.* at 11-13. Stare decisis requires fidelity to that jurisprudence. *Id.* at 13, 15. Thus, although such instructional error "'directly foreclose[s] independent jury consideration of whether the facts proved established certain elements of the offens[e],'" it still must be reviewed for prejudice. *Id.* at 10 (quoting *Carella*, 491 U.S. at 266, Scalia, J., concurring).

In addition, the *Neder* Court distinguished *Sullivan* because an incorrect reasonable doubt instruction "vitiates *all* the jury's findings." *Id.* at 11 (quoting *Sullivan* at 281, emphasis in original). By contrast, an erroneous instruction on an element does not. *Id.* at 10-11. Such instructional error "differs markedly from the constitutional violations we have found to defy harmless-error review." *Id.* at 8. Unlike structural errors, instructional error involving an element "does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9 (emphasis in original). Thus, it must be assessed for its prejudicial effect in light of the circumstances of the particular case. *Id.* at 9-10.

In *Neder,* the trial court told the jury not to consider an element because the court had already determined it was satisfied as a matter of law. In this case, in the Ninth Circuit's view, the trial court told the jury that an element was satisfied because of Powell's own testimony. As the nature of the instructional error is the same, the Ninth Circuit's attempt to recast the error as structural error under *Sullivan* is unavailing. This Court's precedent clearly mandates such instructional error to be reviewed for harmlessness. By ignoring that precedent, the Ninth Circuit's opinion in this case subjects countless state and federal court judgments to unwarranted automatic reversal for instructional errors that may well turn out to be nonprejudicial. It also creates a conflict between the Ninth Circuit and other circuits that have found such error to be subject to harmless error review. *E.g., Caldwell v. Bell,* _ F.3d _, 2002 U.S. App. LEXIS 7858, *7-8 (6th Cir. April 30, 2002) (2002 WL 753804); *Moore v. Ponte*, 186 F.3d 26, 34 (1st Cir. 1999); *Peck v. United States*, 106 F.3d 450 (2n Cir. 1997) (en banc).[3]

---

3. Since reasonable jurists disagree about whether such error is structural, the Ninth Circuit's opinion also constitutes a

On habeas corpus, the appropriate standard of review for prejudice is whether, after examining the record as a whole, the error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Coleman v. Calderon*, 525 U.S. 141, 147 (1998) (per curiam) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)) (remanding to Ninth Circuit to assess instructional error for prejudice). The district court in this case found no error, but alternatively that any error was harmless under the *Brecht* standard,[4/] because the trial court instructed the jurors that the prosecution had the burden to prove all elements beyond a reasonable doubt and that they must form their own conclusions in determining the facts.

---

new rule prohibited by *Teague v. Lane*, 489 U.S. 288 (1989).

4. The district court used the applicable *Brecht* standard, although it did not cite the *Brecht* case. Appendix C, p. 32, fn. 15.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Dated: June 27, 2002

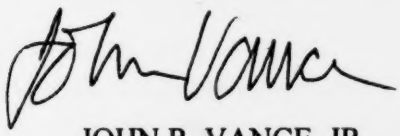
Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

RONALD A. BASS
Senior Assistant Attorney General

PEGGY RUFFRA
Supervising Deputy Attorney General



JOHN R. VANCE, JR.
Deputy Attorney General
Counsel of Record

Counsel for Petitioner